Is the employed scholar free not to publish?

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ABSTRACT
The control of works produced by academics in the course of their employment is a controversial issue. This paper examines the protection offered to employed scholars who do not want to publish their work because of the fear that premature dissemination would damage their academic reputation. The right not to publish of employed scholars has been analyzed considering Anglo-American copyright law on the one hand, and French legislation on the other. Irrespective of the differences between these jurisdictions, both positions allow labour conditions to restrict the right not to publish. On top of the comparison of three legal systems, this paper investigates the question of whether the limitations on the right of disclosure conflict with article 15, paragraph 1 (c) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both Anglo-American and French copyright law are not fully consistent with the protection of moral interests offered by the ICESCR. The reason is that it depends on the labour conditions whether there exists any obligation on academic employees to publish. In the absence of this obligation, the employed scholar enjoys the freedom to decide not to publish. ICESCR does not allow these limitations of disclosure rights since article 15, paragraph 1 (c) does not refer to working conditions.

Keywords: Intellectual property, Copyright, Moral rights, Work for hire, Inalienability

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I. Introduction

It is generally accepted that scholars must be able to control their own intellectual agendas. They should have substantial freedom to determine the dissemination of their research outcomes. Consistently, academics prefer to judge themselves whether and when a work is publishable since premature dissemination will damage their academic reputation[1]. Scholars have a need to control the dissemination of their work since their main focus is on the initial publication of their articles in a recognized or refereed journal. Publications in high impact and prestigious journals will exert an important influence on scholarly reputation. Nevertheless, employed scholars can be under pressure from their universities to publish creative materials at an earlier stage to augment the information available to students.

[1] R.C. Dreyfuss, The Creative Employee and the Copyright Act of 1976, University of Chicago Law Review 1987 (p. 590-647), p. 617: 'By contrast, in the university context, where the interesting works are at the cutting edge of their fields, there is likely to be no one else besides the creative employee who can evaluate the readiness of the work for publication or carry it to fruition if needed. The originator of the work is, in short, indispensable to the creative effort. In transferring copyright from academics to universities, the work for hire rules thus raise a spectre of premature publication, and sacrifice long-term social interests in the work's development to the university's short-term interest in commercialization. Premature publication may, in addition, be highly detrimental to the creator's reputation. If, for example, the work contains errors (errors that the employer may lack expertise to discern or correct), the work's distribution will reflect poorly on the author's abilities as an accurate and careful scholar.'

It is not always the case that an employed scholar has the final say over when a work is complete[2]. The answer to this question varies according to the jurisdiction. Although publication rights are closely connected to the person of the actual creator, national copyright rules do not unconditionally back this autonomy. Default rules of Anglo-American copyright law vest in the employer all rights of the actual creator, including the right of disclosure[3]. French copyright law, which is personality-based, seems to be the exception to this Anglo-American pattern, but it is not certain that French scholars have an absolute discretion over when their work is ready for release. As will be analyzed, both Anglo-American and French copyright law are not fully consistent with the protection of moral interests offered by the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The main question to be dealt with in this contribution is whether article 15, paragraph 1 (c), of the Covenant demands more protection of the right of disclosure than has been assumed so far. As far as this paragraph embodies the inalienability of the right of disclosure, this could mark an end to the distinction between different classes of employed authors. Employed scholars have to be treated equally if article 15, paragraph 1 (c) does not directly or indirectly refer to working conditions. For all these reasons, the ICESCR paragraph will be examined first in order to establish a yardstick to judge Anglo-American copyright law on the one hand, and new French legislation on the other.

II. Article 15, paragraph 1 (c) of ICESCR

[2] Esther Hoorn & Maurits van der Graaf, Towards good practices of copyright in Open Access Journals. A study among authors of articles in Open Access journals (2005-08-05), p. 16: 'In a recent survey among academic authors by ALPSP, 80% of the authors originally held the copyright, with 14.5% the institute or company holding it while with 6.2% the copyright was in dispute.'(http://www.jisc.ac.uk/uploaded_documents/Towards%20Good%20Practices%20of%20Copyright%20in%20Open%20Access%20Journals%20-%20version%201.0new.pdf; retrieved on 2006-07-18). The ALPSP survey only reflects the opinion of the authors concerned; it has not been checked if they correctly assessed the legal situation.

[3] The right of disclosure includes the right to choose when a work is fit for publication. In this sense, the right of disclosure is synonymous with the right of first publication or the freedom not to publish.

It has not yet been established that the scholarly freedom not to publish regards moral interests as relevant to copyright law. This subject matter will be analyzed in the context of national law to which the ICESCR is referring. First it is important to develop a yardstick to compare different, possibly opposite, legal systems. For that purpose, article 15, paragraph 1 (c) of ICESCR, an international provision protecting human rights, will be investigated. The limitations of these rights are relevant in judging jurisdictions which allow employers to enjoy the status of creators.

Article 15, paragraph 1 (c) of ICESCR reads as follows:
'1. The States Parties to the present Covenant recognize the right of everyone:
(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'[4].
The ICESCR Committee has published a general comment on this paragraph which attempts to clarify possible consequences for copyright law[5]. This comment is a non-binding, but authoritative interpretation of the treaty provision that clarifies the meaning of key concepts of the treaty. Distinguishing moral and material interests, the general comment (12 and 15) states that moral interests are directly linked to the personality of the creator, as the material interests of authors are only indirectly linked to the personality of the creator. Concerning moral interests, the general comment (14) contains the following text: 'The Committee stresses the importance of recognizing the value of scientific, literary and artistic productions as expressions of the personality of their creator, and notes that protection of moral interests can be found, although to a varying extent, in most States, regardless of the legal system in force.' All this probably means

[4] International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27 (http://www.ohchr.org/english/law/pdf/cescr.pdf; retrieved on 2006-07-18). It is important to note that France and UK are states parties, but the USA is not; see http://www.ohchr.org/english/countries/ratification/3.htm (retrieved on 2006-07-18).

[5] Committee on Economic, Social and Cultural Rights, The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), General Comment No. 17 (2005). Final edited version (12 January 2006) available at http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/03902145edbbe797c125711500584ea8/$FILE/G0640060.pdf (retrieved on 2006-07-18).

that the embodiment of author's personality in a work is critical for the involvement of moral interests.

Notwithstanding the importance of the protection of moral interests in the context of scientific productions, the general comment (22 and 23) leaves some room for limitations of rights protecting moral or material interests. However, this room is rather constrained as the general comment (22 and 23) requires also that government restrictions on all authors' rights comply with the following multipart test: determined by law, in a manner compatible with the nature of these rights, pursuing a legitimate aim, strictly necessary for the promotion of the general welfare in a democratic society, and proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Although not all components of this multipart test are specific, it is clear that this test is stringent. Jurisdictions granting employed scholars the freedom to decide not to publish presumably are consistent with article 15, paragraph 1 (c) of ICESCR[6].

III. Anglo-American position

UK and US copyright law provide that the employer is the initial owner of the copyrights in the works of its employees. An employer has its own rights that are not derived from an employed author who is not the *de jure* author although he is the factual creator of the work. Consequently, the employee might have to negotiate in order to acquire the rights his employer legally possesses. The employee certainly does not enjoy any inalienable rights as a matter of principle. To corroborate these remarks, UK and US copyright law will be analyzed in this order.

[6] Cf. article 15, paragraph 3 of the International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force 3 January 1976, in accordance with article 27 (http://www.ohchr.org/english/law/pdf/cescr.pdf; retrieved on 2006-07-18): 'The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.'

According to section 11 (2) of the UK Copyright, Designs and Patents Act (CDPA) 1988, the employer is the initial owner of the copyrights in the works of its employees: 'Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary'[7]. However, what is crucial is that section 11 (2) CDPA requires that the works concerned are made 'in the course of his employment'; otherwise the employee will retain his copyright. This condition is not satisfied as academic employees are not obliged to publish[8]. For this reason, universities will not enjoy copyright ownership based on section 11 (2) CDPA. Consequently, universities are not able to deprive their employed academics of the right of first publication although UK law does not incorporate any inalienable right of first publication. Since the academic employee is not obliged to publish he is the owner of the copyright in the UK. As a result, the employed author has the right to determine when his work will be published.

Section 201 (b) of the United States Copyright Act (USCA) bestows on the employer the status of author of the works of its employees: 'In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright'[9]. Parallel to section 11 (2) CDPA, US law requires that the work has been prepared by an employee within the scope of his or her employment[10]. If a particular work is within the scope of employment, the employer has, as each author, the right to publish the work or not since

[7] http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880048_en_2.htm#mdiv11 (retrieved on 2006-07-19).

[8] A.L. Monotti & S. Ricketson, Universities and intellectual property. Ownership and exploitation, Oxford 2003, p. 193-194: an agreement that vests ownership in the employee could be implied by the circumstances. Arguably, this may occur where a university employer permits its academic employees to negotiate unilaterally with publishers and to execute assignments or exclusive licenses of copyright to those publishers.

[9] http://www.copyright.gov/title17/chapter02.pdf (retrieved on 2006-07-18).

[10] Section 101 of the USCA; available at http://www.copyright.gov/title17/chapter01.pdf (retrieved on 2006-07-18).

the right of first publication is a segment of the right of distribution[11], one of the rights of the copyright owner. In the work for hire situation, the university, not the academic, can exercise the right of first publication. However, as in the UK, it depends on the labour conditions whether there exists any obligation on academic employees to publish. If this obligation does not exist, it follows that the employed scholar enjoys the freedom to decide not to publish.

IV. French copyright law

French law explicitly prevents the employer being the initial owner of the copyrights in the works of its employees. However, new legislation could affect the position of public officials, restricting the exercise of their right of first publication in order to promote the public interest. Attention will be paid to a recent French law as this sheds light on the disclosure right of academics employed by universities.

Section L 111-1 of the French Copyright Act (FCA) makes clear that there is no fictitious transfer of rights to the employer:

'The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons.

This right shall include attributes of an intellectual and moral nature as well as attributes of an economic nature, as determined by Books I and III of this Code.

The existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded by the first paragraph above'[12].

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[11] Section 106 (3) of the USCA; available at http://www.copyright.gov/title17/chapter01.pdf (retrieved on 2006-07-18). Cf. L. Von Zumbusch, The Defense of "Fair Use" in Unpublished Works under U.S. and German Copyright Law. A Comparison of an Author's "Moral Right" in Unpublished Works, IIC: International review of industrial property and copyright law 1989 (p. 16-36) p. 24, p. 28-31.

[12] http://195.83.177.9/code/liste.phtml?lang=uk&c=36&r=2493 (retrieved on 2006-07-18). The original text of the third paragraph reads as follows: 'L'existence ou la conclusion d'un contrat de louage d'ouvrage ou de service par l'auteur d'une oeuvre de l'esprit n'emporte aucune dérogation à la jouissance du droit

The consequence of section L 111-1 is that the employer who has ordered a work to be produced or has paid for the realization of it, cannot transform itself into the author of that work. Particularly, the French right of 'divulgation' or disclosure is an inalienable and absolute right of the creator as stated by section L 121-1 and L 121-2 FCA respectively[13]. Section L 111-1 is consistent with the principles of inalienability and absoluteness ruling the right of divulgation. The moral right of divulgation is closely linked to the person of the real creator and cannot be surrendered to his employer. For all these reasons, the French right of divulgation allows employed authors to control the initial publication of their work.

According to prevailing French law, universities cannot oblige scholars to publish their texts in order to contribute to the progress of science[14]. This legal situation would be changed by a recent bill. This bill recognizes public officials as authors but inserts a new article L 127-7 into the Intellectual Property Code restricting the exercise of their right of divulgation[15]. However, the National Assembly did not want to apply this new rule to independent officials and consequently amended the bill to make an exception for employed authors not being subjected to preliminary hierarchical control[16]. This

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reconnu par l'alinéa 1er.' See http://www.legifrance.gouv.fr/WAspad/VisuArticleCode?commun=CPROIN&code=&h0=CPROINTL.rcv&h1=1&h3=3 (retrieved on 2006-07-19).

[13] Sections L 121-1 ('An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible.') and L 121-2 FCA ('The author alone shall have the right to divulge his work') are available at http://195.83.177.9/code/liste.phtml?lang=uk&c=36&r=2497 (retrieved on 2006-07-19).

[14] E. Derieux, Les universitaires et le droit moral d'auteur en droit français, Les Cahiers de propriété intellectuelle 1999 (p. 31-50) p. 45.

[15] Projet de loi relatif au droit d'auteur et aux droits voisins dans la société de l'information, n° 1206, déposé le 12 novembre 2003; available at http://www.assemblee-nationale.fr/12/pdf/projets/pl1206.pdf (retrieved on 2006-07-19).

[16] Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information, J.O n° 178 du 3 août 2006 page 11529; available at http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MCCX0300082L# (retrieved on 2006-08-08):
TITRE II: DROIT D'AUTEUR DES AGENTS DE L'ÉTAT, DES COLLECTIVITÉS TERRITORIALES ET DES ÉTABLISSEMENTS PUBLICS À CARACTÈRE ADMINISTRATIF (articles 31 et 32)

exception probably means that employed academics not being directed by their universities to do any particular research or to reduce their results to any particular form enjoy the freedom to decide not to publish.

V. Comparison and concluding remarks

The right not to publish is important to employed scholars who want to protect their academic reputation. However, there are differences between the protection offered by Anglo-American copyright law on the one hand, and French legislation on the other. These differences will be summarized before discussing them in the perspective of article 15, paragraph 1 (c) of ICESCR.

UK and US copyright law do not explicitly guarantee a right of first publication as French law does. According to the Anglo-American position the right of first publication is not fully separated from the economic right of distribution. By contrast, the French right of divulgation is an inalienable and absolute right of the creator. However, this difference does not justify the conclusion that the French legal system offers more protection to all employed scholars. Only independent scholars enjoy the freedom to

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I. - Le troisième alinéa de l'article L. 111-1 du code de la propriété intellectuelle est ainsi rédigé :
« L'existence ou la conclusion d'un contrat de louage d'ouvrage ou de service par l'auteur d'une oeuvre de l'esprit n'emporte pas dérogation à la jouissance du droit reconnu par le premier alinéa, sous réserve des exceptions prévues par le présent code. Sous les mêmes réserves, il n'est pas non plus dérogé à la jouissance de ce même droit lorsque l'auteur de l'oeuvre de l'esprit est un agent de l'Etat, d'une collectivité territoriale, d'un établissement public à caractère administratif, d'une autorité administrative indépendante dotée de la personnalité morale ou de la Banque de France. »
II. - Le même article est complété par un alinéa ainsi rédigé :
« Les dispositions des articles L. 121-7-1 et L. 131-3-1 à L. 131-3-3 ne s'appliquent pas aux agents auteurs d'oeuvres dont la divulgation n'est soumise, en vertu de leur statut ou des règles qui régissent leurs fonctions, à aucun contrôle préalable de l'autorité hiérarchique. »

Après l'article L. 121-7 du code de la propriété intellectuelle, il est inséré un article L. 121-7-1 ainsi rédigé :
« Art. L. 121-7-1. - Le droit de divulgation reconnu à l'agent mentionné au troisième alinéa de l'article L. 111-1, qui a créé une oeuvre de l'esprit dans l'exercice de ses fonctions ou d'après les instructions reçues, s'exerce dans le respect des règles auxquelles il est soumis en sa qualité d'agent et de celles qui régissent l'organisation, le fonctionnement et l'activité de la personne publique qui l'emploie. »

decide not to publish under French law. Essentially UK and US law take the same position. The common core of the legal systems just mentioned shows that the obligation to publish removes the disclosure rights of employed academics. If the obligation to publish is absent, academics have the possibility to preserve their intellectual independence from the institution which employs them by controlling the dissemination of their ideas. In this respect it can be stated that labour conditions are the dominating factor of copyright in universities.

The protection of the right not to publish is not the same for the dependent and the independent scholar employed by universities. This implies that the right of disclosure is threatened by unpredictability if the obligations of academic employees to publish are not specific. Article 15, paragraph 1 (c) of ICESCR will intensify this uncertainty. Although neither this article nor the general comment explicitly mention the right of first publication, it could be suggested that legal systems incorporating a right of disclosure have to pass the stringent test on limitations. Arguably, article 15, paragraph 1 (c) of ICESCR has been drafted to protect reputational interests of employed scholars against unauthorized first publication. In this context, it is not decisive to qualify these reputational interests as moral or as material. Following this line of thought, all systems compared will conflict with the test on limitations since article 15, paragraph 1 (c) does not directly or indirectly refer to working conditions.

The real creator of scientific works should not be unprotected against premature disclosure since she/he is the person best placed to decide upon first publication. As has been stated clearly: 'Authors are (...) the most likely persons to pursue publication expeditiously, but not prematurely, as this may damage their reputation'[17]. Their possible objections to divulgation of their work do not automatically imply the misuse of their right of first publication. Therefore, as long as article 15, paragraph 1 (c) of ICESCR intensifies legal uncertainty caused by national copyright law; it is recommended that universities contractually relinquish the right of first publication to their employed

[17] A.L. Monotti & S. Ricketson, Universities and intellectual property. Ownership and exploitation, Oxford 2003, p. 335.

academics. To prevent negotiations about terms of labour contracts, it has to be preferred that universities will issue copyright policy documents[18] including the inalienability and absoluteness of the right of first publication.

[18] See e.g. Harvard University. Statement of Policy in Regard to Inventions, Patents, and Copyrights. Adopted by the President and Fellows of Harvard College on November 3, 1975 and amended on March 17, 1986, February 9, 1998 and August 10, 1998; available at http://www.techtransfer.harvard.edu/files/PatentPolicy.pdf (retrieved on 2006-07-19): 'the policy should protect the traditional rights of scholars with respect to the products of their intellectual endeavors. For example, the policy should not interfere with the right of a scholar to decide to publish a book or an article and, if so, when and under what circumstances.'